

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-7235

In The
United States Court of Appeals
For The Second Circuit

FIMEX CORP.,
Plaintiff-Appellant,

vs.

BARMATIC PRODUCTS CO.,
Defendant-Respondent.

*On Appeal from the United States District Court for the Eastern
District of New York.*

**REPLY BRIEF FOR
PLAINTIFF-APPELLANT**

JULIEN & SCHLESINGER, P.C.,

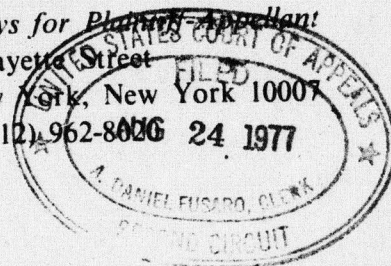
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In The
United States Court of Appeals
For the Second Circuit

FIMEX CORP.,

Plaintiff-Appellant,

vs.

BARMATIC PRODUCTS CO.,

Defendant-Respondent.

PLAINTIFF-APPELLANT'S REPLY BRIEF

POINT I

THE DEFENDANT APPELLEE HAS NOT PROVIDED
ANY AUTHORITY SUPPORTING THE DECISION OF THE
COURT BELOW DISMISSING THE PLAINTIFF'S
COMPLAINT

The sole authority provided by the Defendant-Appellee in its' Brief in Support of the Court below's dismissal of the Plaintiff's Complaint are various commentators which have stated that the Robinson-Patman Act does not apply to goods sold for export, however, even the commentators relied upon by the Defendant have not stated that the Robinson-Patman Act should

not apply to goods sold to businessmen located within the United States competing with businessmen located within the United States when some of those goods are later exported.

The Defendant has been compelled to admit in its Brief that the Robinson-Patman Act, except for subdivision (a) has consistently been found to apply to goods which are ultimately resold outside the United States as well as to goods which are resold within the United States. See Baysoy v. Jessop Steel Co., 90 F. Supp. 303, 305 (W.D. Pa. 1950); Canadian Ingersoll-Rand Co. v. D. Loveman & Sons, Inc., 227 F. Supp. 829, 833 (N.D. Ohio 1964).

The Defendant has also been compelled to admit that Sections 2(c), (d) and (e) of the act were designed to plug the loopholes of permitting indirect price discrimination prohibited by Section 2(a) through disguised price concessions or dummy brokerage payments and other allowances. See H.R. Rep. No. 2287, 74th Cong. 2d Sess. 14-16 (1936). It would be illogical for Congress to have intended that Sections 2(c), (d) and (e) of the act which were enacted to prevent an evasion of Section 2(a) to be applicable to goods which are ultimately resold outside of the United States and to make the primary section, Section 2(a) only applicable to goods ultimately resold within the United States.

The case relied upon both by the Court below and by the Defendant in this Court Zenith Radio Corp. v. Matsushita Elect. Indust. Co., 402 F. Supp. 244 (E.D. Pa.), pet. denied, 521 F. 2d

1399 (3d Cir. 1975); is totally inapplicable to the case at bar. Zenith dealt with a situation where goods were sold at a higher price outside of the United States which goods never reached the United States and were not sold to anyone within the United States. Here the goods sold to the Plaintiff were sold to the Plaintiff in the United States and the Plaintiff was competing with other businessmen in the United States for sales both in the United States and abroad.

The Robinson-Patman Act was intended to protect businessmen within the United States from being placed at a disadvantage by being charged discriminatory prices. There is nothing in the act or in the purpose of the act which makes it inapplicable to the situation such as the one now before the Court.

POINT II

THERE ARE NUMEROUS INACCURACIES IN THE DEFENDANT-APPELLEE'S BRIEF WHICH SHOULD BE CALLED TO THE COURT'S ATTENTION

The Defendant-Appellee's Brief contains numerous inaccuracies and slants the fact in a manner which is misleading. In order to clarify the facts for the Court the following inaccuracies should be called to the attention of the Court:

(1) Defendant-Appellee sets forth on page 7 of its Brief that the Plaintiff's consistent pattern of doing business was to first obtain an order from a customer and then go out and seek a supplier to fill that order. In support of that statement the Defendants refers the Court to various pages in the appendix

which contain portions of the plaintiff's deposition. The defendant is obviously attempting to give the Court the impression that the plaintiff conducts its business by first obtaining an order from a customer and then seeks a supplier to fill that order. The purpose of the defendant's attempt to provide the Court with this impression is to contradict the plaintiff's position that it purchased goods from the defendant for both export and resale within the United States, but was unable to make any sales within the United States because of the discriminatory price charged to the plaintiff. A review of the plaintiff's deposition -- in fact the very pages referred to by the defendant -- indicate that this is not the way the plaintiff conducts its business at the present time.

The plaintiff clearly stated that in 1947 (JA 69)* it conducted its business in that fashion, but that some time between 1965 and 1970, the plaintiff moved its headquarters to Long Island, obtained 7,000 feet of warehouse space and no longer followed a course of first obtaining an order and then seeking a supplier (JA 77-78). The plaintiff made it clear that its present mode of doing business was to purchase materials and then resell them to its customers. The affidavit of Isaac L. Cohen dated February 24, 1977 makes it

*All page references are to the joint appendix unless otherwise indicated.

clear that there are numerous items purchased by the plaintiff from the defendant which it has been unable to sell either domestically or abroad because of the discriminatory price charged to it by the defendant (56A - 57A).

(2) The Court below in its decision stated that the only item which the plaintiff had been unable to dispose of were 500 tie rods purchased from the defendant and that those tie rods had been purchased pursuant to an order which designated the cartons to be marked "FIMEX OTO ISTANBUL" so that the defendant had a right to believe that the goods were for export.

The defendant in its brief to this Court likewise states that the only items which the plaintiff claims to have purchased for resale in the United States are 500 tie rods (defendant's brief, p. 22). Both the Court below and the defendant completely ignore the affidavit submitted by Isaac L. Cohen (JA 56-57) indicating that there were numerous other items purchased from the defendant by the plaintiff which the plaintiff was unable to sell because of the defendant's discriminatory price and the purchase order for which made no reference at all to any markings or anything which could possibly lead the defendant to believe that the goods were destined for export. In addition, the plaintiff made it clear that the markings "OTO ISTANBUL" were not intended to signify that the goods were being exported, but were simply

an internal mark used by the plaintiff for warehousing purposes. This was made clear during the plaintiff's deposition (JA 113-114).

The defendant claims that the plaintiff admitted that each and every order provided to the defendant was for export since the plaintiff did not contest the defendant's 9(g) statement which stated that Fimex "consistently" advised Barmatic that it was purchasing goods for export to Turkey (defendant's brief, p. 10). The plaintiff does not contest that on numerous occasions it advised the defendant that certain goods were to be exported to Turkey. The defendant in preparing its 9(g) statement took great care not to state that the plaintiff advised the defendant that each and every order was for export to Turkey because the defendant well knew that this was untrue and would be countered by the plaintiff's 9(g) statement. The defendant thus chose the word "consistently" so that the plaintiff could not in good faith deny that it had on numerous occasions notified the defendant that certain goods were to be exported and the defendant could later make the claim that its use of the ambiguous term "consistently" was intended to mean each and every occasion. Such gamesmanship should not be permitted by the Court.

(3) Similarly misleading is the defendant's claim that the plaintiff stated that the amount of business it did in the United States was of no concern to it (defendant's brief, p. 6) when in fact what the plaintiff did state in response to

certain badgering questions by defendant's counsel was that the plaintiff had never attempted to figure out the percentages of its sales domestically or abroad because it was of no concern to the plaintiff which percentages of its sales were made domestically or abroad so long as the sales were made (JA 110).

CONCLUSION

The defendant had two separate price lists with greatly varying prices (JA 42 - JA 52). The plaintiff was provided with only the higher price list and for years was compelled to pay a higher price and was injured in its business. The Robinson-Patman Act was intended to protect businesses within the United States from being discriminated against in this manner. The decision of the Court below stating that the Robinson-Patman Act was inapplicable to the case at bar was error and should be reversed.

Respectfully submitted,

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David Jaroslawicz

**COURT OF APPEALS
SECOND CIRCUIT**

FIMEX CORP.,

Plaintiff-Appellant

- against -

BAR MATIC PRODUCTS, CO.,

Defendant-Appellee.

Index No.

Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF

SS.:

I, **Robert Martinez** being duly sworn,
depose and say that deponent is not a party to the action, is over 18 years of age and resides at
1165 Morris Avenue; Bronx, New York
That on the **24th** day of **August** **1977**, deponent served the annexed

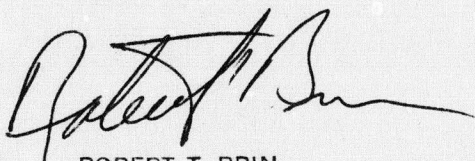
Reply Brief

upon **Arent Fox Kister Flothin & Kahn, Esqs.** attorney(s) for

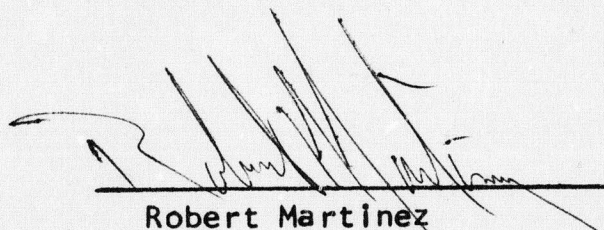
in this action, at **1618 H. St., N.W.
Washington, D.C.**

the address designated by said attorney(s) for that
purpose by depositing a true copy of same, enclosed in a postpaid properly addressed wrapper in a
Post Office Official Depository under the exclusive care and custody of the United States Post Office
Department, within the State of New York.

Sworn to before me, this **24th**
day of **August**, **1977**.



ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1979



Robert Martinez

COURT OF APPEALS
SECOND CIRCUIT

FIMEX CORP.,
Plaintiff-Appellant,

- against -

BAR MATIC PRODUCTS, CO.,
Defendant-Appellee.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF

ss.:

I, James A. Steele being duly sworn, depose and say that deponent is not a party to the action,
is over 18 years of age and resides at 112 West 136th Street; New York, New York

That on the 24th day of August, 19 77 at 475 Park Avenue
New York, N.Y.

deponent served the annexed

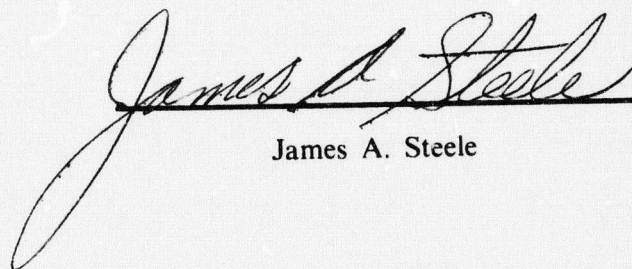
upon

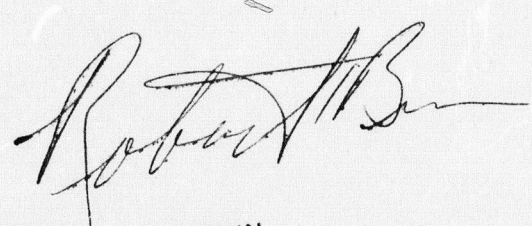
Reply Brief

Barnes Richardson & Cdburn, Esqs

the in this action by delivering a true copy thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the herein,

Sworn to before me, this 24th
day of August, 19 77


James A. Steele


ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31 0418950
Qualified in New York County
Commission Expires March 30, 1979